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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ACOSTA, Defendant and Appellant.	H042798 (Santa Cruz County Super. Ct. No. F06753)

I. INTRODUCTION

Defendant Fernando Acosta pleaded guilty to a violation of Vehicle Code section 10851, subdivision (a) (hereafter Vehicle Code section 10851(a)), possession of a controlled substance (former Health & Saf. Code, § 11350, subd. (a)), and misdemeanor resisting an officer (former Pen. Code, § 148, subd. (a)(1)),[1] and admitted that he had served a prior prison term (§ 667.5, subd. (b)). In 2015, after he had completed his sentence, defendant filed an application with the trial court pursuant to section 1170.18, subdivision (f), which was enacted as part of Proposition 47, to have his felony Vehicle Code and drug offenses redesignated as misdemeanors. The court granted the application as to the drug offense, but denied the application as to the Vehicle Code offense.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends that his felony conviction under Vehicle Code section 10851(a) should have been reduced to a misdemeanor under Proposition 47, and that the trial court erred by refusing to do so. For reasons that we will explain, we will affirm the order.

II. BACKGROUND

Defendant was charged by complaint in 2003 with a violation of Vehicle Code section 10851(a) (count 1), possession of a controlled substance (former Health & Saf. Code, § 11350, subd. (a); count 2), and misdemeanor resisting an officer (former § 148, subd. (a)(1); count 3). Regarding the Vehicle Code violation (count 1), the complaint alleged that defendant "did unlawfully drive and/or take a certain vehicle, . . . a 1986 Chevy Nova, . . . then and there the personal property of [the victim] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle." (Some uppercase omitted.) The information also alleged that defendant had served a prior prison term (§ 667.5, subd. (b)).

Defendant pleaded guilty to all three counts and admitted the prison prior allegation. The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions.

In 2005, defendant admitted violating his probation. The trial court terminated his probation and sentenced him to prison for two years four months.

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 reclassified certain drug- and theft-related offenses as misdemeanors instead of felonies or alternative felony misdemeanors. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 308 (*Shabazz*); see § 1170.18, subd. (a).) Proposition 47 also added a new statute, section 490.2, which generally defines petty theft as the theft of property valued at $950 or less. (§ 490.2, subd. (a); *Shabazz*, *supra*, at p. 308.) In addition, Proposition 47 added section 1170.18, which sets forth the

procedure for a defendant who has completed his or her sentence for a felony conviction and seeks to have the conviction redesignated as a misdemeanor. Upon application by the defendant, the trial court must make the misdemeanor designation if the defendant meets the requisite criteria and has not suffered a prior conviction for a specified serious or violent felony or an offense requiring registration as a sex offender. (§ 1170.18, subds. (f), (g) & (i).)

In 2015, after having completed his sentence, defendant filed an application with the trial court seeking to have his felony convictions for the Vehicle Code offense and the drug offense redesignated as misdemeanors. The prosecution, in a written response, did not object to redesignation of the drug offense as a misdemeanor, but indicated that the Vehicle Code offense was not "reducible per Prop 47."

Defendant subsequently filed a memorandum in support of his application for redesignation. He contended that his Vehicle Code section 10851 offense was based on him "stealing a 1986 Chevrolet Nova with 142,000 miles on it," and that the vehicle was worth less than $950. He argued that Vehicle Code section 10851 was a "theft statute," and that his offense could properly be redesignated as misdemeanor petty theft under section 490.2. He further contended that it would violate the equal protection clauses of the federal and state Constitutions if a conviction for grand theft of an automobile under section 487, subdivision (d), but not a conviction for taking a vehicle under Vehicle Code section 10851, may be reduced to misdemeanor petty theft.

On September 15, 2015, the trial court held a hearing on defendant's application to redesignate his felony offenses as misdemeanors. The court granted the application as to the drug offense, but denied the application as to the Vehicle Code offense.

III. DISCUSSION

Defendant contends that the trial court erred in denying his application to redesignate his felony conviction for violating Vehicle Code section 10851(a) as a misdemeanor. He argues that the conviction should have been redesignated as

misdemeanor petty theft under section 490.2, subdivision (a), which was enacted by Proposition 47.[2] In making this argument, defendant asserts that the trial court made an express finding that the vehicle he took was worth less than $950.

The Attorney General contends that a violation of Vehicle Code section 10851 is not an offense that may be redesignated as a misdemeanor under Proposition 47. The Attorney General also argues that the trial court "did not unambiguously find that the value of [the victim's] vehicle was under $950," and that the court instead contemplated holding an evidentiary hearing if necessary.

Whether defendant's Vehicle Code offense may be redesignated as a misdemeanor turns on the proper construction of Proposition 47. When interpreting an initiative such as Proposition 47, "we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.)

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[2] The issue of whether a felony conviction under Vehicle Code section 10851(a) may be redesignated as a misdemeanor under Proposition 47 is currently before the California Supreme Court. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041; *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted Nov. 30, 2016, S237975.)

Regarding the language of Proposition 47, one of the criteria for redesignation of a felony conviction as a misdemeanor is that the defendant "would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense." (§ 1170.18, subd. (f).) In this case, defendant was convicted of violating Vehicle Code section 10851(a).[3] Proposition 47 did not amend Vehicle Code section 10851. Both before and after the enactment of Proposition 47, Vehicle Code section 10851(a) has provided that unlawfully driving or taking a vehicle is punishable as either a felony or a misdemeanor. Thus, a Vehicle Code section 10851(a) offense, when charged as a felony as in this case and as admitted by defendant's guilty plea, is still a felony after Proposition 47. Defendant therefore does not satisfy one of the criteria for redesignation as a misdemeanor under Proposition 47. (§ 1170.18, subd. (f); *People v. Johnston* (2016) 247 Cal.App.4th 252, 256, review granted July 13, 2016, S235041 (*Johnston*).)

Defendant contends that the reference to "theft" in section 490.2, which was added by Proposition 47, applies to his felony Vehicle Code conviction such that the conviction must be reduced to a misdemeanor under section 490.2.

Before considering the specific language of section 490.2, which refers to theft, grand theft, and petty theft, we first consider the general relationship between these legal concepts. "Section 484, subdivision (a), defines the crime of theft: 'Every person who shall feloniously steal, take, . . . or drive away the personal property of another . . . is guilty of theft.' " (*People v. Ortega* (1998) 19 Cal.4th 686, 693 (*Ortega*).) The crime of

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[3] Vehicle Code section 10851(a) states: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment."

theft is divided into two degrees, grand theft and petty theft. (§ 486; *Ortega*, *supra*, at p. 696.) Section 487 and several other statutes define the forms of theft that constitute grand theft. (See *People v. Cuellar* (2008) 165 Cal.App.4th 833, 837; *Ortega*, *supra*, at p. 696.) Section 488 provides that "[t]heft in other cases is petty theft."

"The distinctions between grand and petty theft according to the Penal Code are in the type of article stolen, whether the article was taken from the person of another and in the value thereof. [Citations.]" (*Gomez v. Superior Court* (1958) 50 Cal.2d 640, 645.) For example, section 487 defines grand theft to include the taking of personal property worth more than $950. (*Id.*, subd. (a).) Section 487 also defines grand theft to include the taking of an automobile. (*Id.*, subd. (d)(1).)

Section 490.2, which was added by Proposition 47, states: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).) Section 490.2 thus amends the definition of grand theft, as set forth in section 487 or any other provision of law, to make some thefts that would have previously been grand theft to now be petty theft.

Defendant was convicted of violating Vehicle Code section 10851(a). Vehicle Code section 10851 is not a "provision of law defining grand theft" (§ 490.2, subd. (a)). Further, the proscriptions in Vehicle Code section 10851(a) against driving or taking a vehicle are broader than the crime of theft of an automobile (§§ 484, 487, subd. (d)(1)). A theft is committed only if the defendant intends to " '*permanently* deprive' " the victim of his or her property. (*People v. Abilez* (2007) 41 Cal.4th 472, 510.) In contrast, a defendant may violate Vehicle Code section 10851(a) by taking a vehicle with the intent to permanently deprive the owner of possession, *or* by driving it with the intent only to " '*temporarily* deprive' " the owner of possession. (*People v. Garza* (2005) 35 Cal.4th 866, 876, italics added (*Garza*); see *id.* at p. 871.) In other words, Vehicle Code

section 10851(a) " 'prohibits driving as separate and distinct from the act of taking.' " (*Garza*, *supra*, at p. 876.) Given that Vehicle Code section 10851(a) may be violated with or without a defendant committing theft, and given that Vehicle Code section 10851(a) does not "defin[e] grand theft" or petty theft (§ 490.2, subd. (a)), we are not persuaded that the enactment of section 490.2, which simply changed the distinction between a grand theft and a petty theft, operates along with section 1170.18 to require the redesignation of a felony Vehicle Code section 10851(a) offense as misdemeanor petty theft.

The ballot materials for Proposition 47 support our construction that the electorate intended certain *grand thefts* to be redesignated as misdemeanor petty thefts, rather than providing for the redesignation of any crime that could have been charged as theft but was not so charged, such as some violations of Vehicle Code section 10851(a). The Legislative Analyst's analysis of Proposition 47, which was printed in the ballot materials, states: "This measure reduces *certain* nonserious and nonviolent property and drug offenses from wobblers or felonies to misdmeanors. . . . *Specifically*, the measure reduces the penalties *for the following crimes*: [¶] [] ***Grand Theft.*** Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be *charged as grand theft*, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the *theft of certain property* (*such as cars*) . . . . This measure would *limit when theft* of property of $950 or less *can be charged as grand theft*. Specifically such crimes would *no longer be charged as grand theft* solely because of the type of property involved . . . ." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, some italics added.) Thus, the electorate must have understood and intended that the "[s]pecifically" listed crime of grand theft (*ibid*.), including grand theft auto (§ 487, subd. (d)(1)), would, upon passage of Proposition 47, be charged, treated, and/or redesignated as misdemeanor petty theft if the property was

worth less than $950. As we have explained, Vehicle Code section 10851(a) is not a provision of law defining grand theft. Moreover, nothing in the ballot materials suggests that Proposition 47 was intended to redesignate other crimes that could have been charged as grand theft auto, but were not so charged, such as some violations of Vehicle Code section 10851(a).

Defendant observes that section 666, which was amended by Proposition 47 and which provides the punishment for a defendant convicted of petty theft with a prior conviction, expressly refers to a conviction for "*auto theft* under Section 10851 of the Vehicle Code." (§ 666, subd. (a), italics added.) According to defendant, the electorate must have therefore "understood a violation of [Vehicle Code] section 10851 to be a crime of 'theft,' when that term was used in another section of the initiative."

Defendant's argument is unpersuasive. Before and after Proposition 47, section 666 has referred to convictions for "petty theft, grand theft, . . . [*and*] auto theft under Section 10851 of the Vehicle Code." (§ 666, subd. (a); Stats. 2013, ch. 782, § 1.) We are not persuaded that the enactment of section 490.2, which simply changed the definition of what constitutes petty theft versus grand theft, means that the electorate intended a Vehicle Code section 10851 conviction to be redesignated as a theft conviction under sections 484 and 490.2.

Defendant next contends that a violation of Vehicle Code section 10851(a) is a lesser included offense of grand theft auto (§ 487, subd. (d)(1)). He argues it would be anomalous to allow the greater offense for grand theft auto to be redesignated as misdemeanor petty theft under section 490.2 if the value of the vehicle is less than $950, but to not allow the redesignation of the lesser offense of violating Vehicle Code section 10851(a) where the value of the vehicle is also less than $950.

As stated, Vehicle Code section 10851(a) proscribes a broader range of conduct than just the theft of a vehicle. Assuming a violation of Vehicle Code section 10851(a) is a lesser included offense of grand theft auto, a lesser included offense is not necessarily

less serious than the greater offense. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 839 (*Wilkinson*).) For example, there may be a case in which a defendant intended only to temporarily deprive the victim of possession of the vehicle, but the victim was nevertheless affected to a greater degree, such as being unable to go to work and losing a job, than another victim whose *spare* vehicle was taken by a defendant who had the intent to permanently deprive the victim of the vehicle. (See *People v. Sauceda* (2016) 3 Cal.App.5th 635, 651, review granted Nov. 30, 2016, S237975 [explaining that more severe punishment for a Vehicle Code § 10851 offense may "rationally be explained by a desire to seriously punish conduct which may affect vulnerable citizens, but which may not qualify as theft, such as temporarily taking a vehicle to prevent a victim from fleeing"].)

Defendant further argues that treating those convicted of the lesser offense of a violation of Vehicle Code section 10851(a) more harshly than the greater offense of grand theft auto would violate federal and state equal protection principles.

The California Supreme Court has instructed that "[a] defendant . . . 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' [Citations.]" (*Wilkinson, supra,* 33 Cal.4th at p. 838.) Therefore, the rational basis test is applicable to an equal protection challenge involving an alleged sentencing disparity. (*Ibid.*)

In *Wilkinson*, the defendant argued that his conviction for battery on a custodial officer violated equal protection, because the statutory scheme authorized felony punishment for the " 'lesser' " offense of battery on a custodial officer *without* injury, while the " 'greater' " offense of battery on a custodial officer *with* injury was a wobbler offense that allowed misdemeanor punishment. (*Wilkinson, supra,* 33 Cal.4th at p. 832.) In applying the rational basis test, the California Supreme Court rejected the defendant's challenge, explaining that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion

in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*Id.* at p. 838.) Defendant's equal protection challenge in this case therefore fails. We also observe that the issue before us was considered in *Johnston*, which found a rational basis for the electorate's distinction in treatment between section 487 and Vehicle Code section 10851 under Proposition 47. The appellate court explained that "[t]he electorate was not obligated to extend relief under the initiative to *all* similar conduct. It could instead move in an incremental way, gauging the effects of this sea change in penal law. Particularly given the insignificant numbers of vehicle thefts at issue in light of vehicle prices at present, the electorate could conclude this would not work an injustice." (*Johnston*, *supra*, 247 Cal.App.4th at p. 259, review granted.) We agree with the reasoning in *Johnston*.

Relying on *People v. Olivas* (1976) 17 Cal.3d 236 (*Olivas*) and its progeny, defendant contends that the present case involves a fundamental liberty interest, and thus a compelling state interest must be shown to justify the omission of Vehicle Code section 10851 from the reach of Proposition 47. The California Supreme Court in *Wilkinson* rejected this interpretation of *Olivas*: "The language in *Olivas* could be interpreted to require application of the strict scrutiny standard whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes, because such statutes always implicate the right to 'personal liberty' of the affected individuals. Nevertheless, *Olivas* properly has not been read so broadly." (*Wilkinson*, *supra*, 33 Cal.4th at p. 837.) As previously stated, *Wilkinson* concluded that the appropriate standard for such sentencing disparities was the rational basis standard. (*Id.* at p. 838.)

In sum, we determine that defendant's felony conviction for violating Vehicle Code section 10851(a) is not eligible for redesignation as a misdemeanor under Proposition 47. (§§ 1170.18, subd. (f), 490.2, subd. (a).) Accordingly, the trial court properly denied defendant's application for redesignation of this conviction. (See

§ 1170.18, subds. (f) & (g).) In view of our conclusion, we need not address the parties' dispute as to whether the trial court determined that the vehicle defendant took was worth less than $950.

IV. DISPOSITION

The September 15, 2015 order is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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